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## EXTRAORDINARY

### PART II—Section 3

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No 113 NEW DELHI, TUESDAY, MAY 18, 1954

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#### ELECTION COMMISSION, INDIA

##### NOTIFICATION

*New Delhi, the 4th May 1954*

**S.R.O. 1612.**—Whereas the election of Shri Vithalbhai Ranchhodbhai Patel of Mehsana, Bombay State, to the Legislative Council of the State of Bombay, from the Mehsana-cum-Banaskantha Local Authorities constituency was called in question by an election petition presented by Shri Nyalchand Virchand Sheth, Advocate of Vijapur, District Mehsana;

And whereas the Election Tribunal appointed by the Election Commission for the trial of the said petition dismissed it by an order dated the 30th January, 1953 which was published in the Gazette of India, Extraordinary, Part II, Section 3 dated the 7th February 1953, and thereafter ceased to exist;

And whereas the High Court of Judicature at Bombay on the application of the petitioner had set aside the order of the Election Tribunal and had sent the petition back to the Tribunal with a direction to further inquire into it;

And whereas the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of Section 86 of the said Act, for the further trial of the said petition has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its order to the Commission;

Now, therefore, in pursuance of Section 106 of the said Act, the Election Commission hereby . . . . . order of the Tribunal.

ELECTION PETITION No. 323 OF 1952

CORAM:

Exh. No. 99.

Shri B. C. Vakil, B.A. (Hons.), LL.B., *Chairman.*

Shri T. P. Ghogale, B.A. (Hons.) LL. B.,

Shri A. A. Adarkar, B. A., LL. B.—*Members of the Election Tribunal.*

In the matter of the Representation of the People Act, 1951

and

In the matter of the Representation of the People (Conduct of Election and Election Petitions) Rules, 1951

and

In the matter of the Election Petition presented thereunder by Shri Nyalchand Virchand Sheth, residing at Vijapur, District Mehsana, *Petitioner.* (In person.)

*Versus*

1. Vithalbhai Ranchhodbhai Patel, residing at Mehsana.
2. Krishnalal Motilal Sheth, residing at Patan, District Mehsana.
3. Ishver Chhagan Patel, residing at Chansama, District Mehsana.
4. Vijaykumar Madhavlal Trivedi, residing at Mehsana, respondents.

(Shri P. B. Patwari and Shri J. B. Mehta.)

Election petition No. 323 of 1952 was filed by Shri Nyalchand Virchand Sheth, an Advocate from Vijapur, District Mehsana, on 20th June 1952 to set aside the election of respondent No. 1 Shri Vithalbhai Ranchhodbhai Patel, who was declared elected as a member of the Bombay Legislative Council from Mehsana-cum-Banaskantha Local Authorities' Constituency at an election held on 8th April 1952. The Election Tribunal, constituted for the trial of the petition, dismissed the said petition on 30th January 1953 and ordered the petitioner to pay respondent No. 1 Rs. 100 as costs of and incidental to the petition. Thereafter the petitioner Shri Nyalchand approached the High Court of Bombay by Special Civil Application No. 847 of 1953. By its order dated 9th November 1953 the High Court observed that the Constitution had given the Election Tribunal finality to its decision and the point urged before the High Court was not by way of appeal or disputing any finding of the Tribunal but the Tribunal had failed to exercise the jurisdiction vested in it under Section 99 to make an order with regard to a corrupt practice or an illegal practice. The High Court, therefore, directed the Tribunal to consider the following two questions:—

- (1) Whether any major corrupt practice was committed either by Mehta or by respondent No. 1 within the meaning of Section 123, sub-section (8) of the Act?
- (2) Whether any illegal practice has been committed by Shri Dahyalal Mehta within the meaning of sub-section (1) of Section 125, in that Shri Dahyalal Mehta spent for the postage on the letters sent by him to various voters asking them to vote for Congress candidates?

In considering the first of these two points, the High Court directed that the Tribunal should consider (a) Whether in law Dahyalal Mehta was the Agent of respondent No. 1, and (b) Whether respondent No. 1 by his conduct or acts ratified the signing of the letters by Dahyalal Mehta to the voters asking them to vote for Congress Candidates.

2. After the above order was passed by the High Court, the Election Commission reconstituted the present Tribunal. Notices were issued to the parties and were made returnable on 1st March 1954. On 1st March 1954 the petitioner Shri Nyalchand appeared in person and Shri P. B. Patwari and Shri J. B. Mehta appeared for the contending respondent No. 1 Shri Vithalbhai R. Patel. Shri Patwari filed application Ex. 92 contending that the Tribunal had no jurisdiction to consider the questions referred on the grounds stated by him and also on the ground that the questions were referred as the petitioner had wrongly stated certain facts having been admitted and had suppressed the true facts on the record. By its order dated 2nd March 1954 the Tribunal ordered that the Tribunal would hear the questions referred and would also consider the points raised by Shri Patwari but would not treat them as preliminary objections as it was keen to see that the matter was disposed of once for all. The next sitting of the Tribunal was fixed on 11th March 1954. On that day the petitioner gave application Ex. 93 praying amongst other things that the Tribunal should raise a preliminary issue whether it had jurisdiction to decide the status of Shri Dahyalal Mehta. The Tribunal by its order dated 11th March 1954 ruled that it was not necessary to raise the preliminary issue suggested by the petitioner. It observed that the High Court of Bombay had been pleased to send the questions for the consideration of the Tribunal and the Tribunal would hear the parties and consider those questions in accordance with law. The petitioner then commenced his arguments on the points framed by the High Court and he finished his arguments on 12th March 1954 by recess time. Shri Patwari for respondent No. 1 had contended that the question whether Shri Dahyalal Mehta was a person serving under the State of Bombay was a hotly contested question by respondent No. 1 and there was also an issue raised by the Tribunal which the Tribunal had not decided in its previous judgment, as it had thought it unnecessary to do so but it would be necessary to consider that question while deciding the first point framed by the High Court as to whether any major corrupt practice had been committed either by Mehta or by respondent No. 1 within the meaning of Section 123 (8) of the Act. The Tribunal had, therefore, thought it fit to give an opportunity to the petitioner Shri Nyalchand to say what he wanted to say on the alleged status of Shri Dahyalal Mehta subject to his contention that the Tribunal should

proceed further taking it as a settled fact that Shri Dahyalal Mehta was a person serving under the State of Bombay. The petitioner, Shri Nyalchand, had thrashed out this point at great length at the time of the arguments of the Election Petition but the Tribunal thought that he should have an opportunity to say whatever he wanted to say in this connection at this stage also. The petitioner, however, stated that as it was a fact which was decided by the High Court's order, he did not want to say anything in that connection and he did not want to take any part in the argument of that matter. Before Shri Patwari could commence his arguments the petitioner gave application Ex. 96 for time to take steps to get this proceeding transferred to another Tribunal as the Tribunal had in another matter considered the question of Shri Dahyalal's status. Though the petition was old the Tribunal gave one month's time to the petitioner Shri Nyalchand to take steps and to bring a stay of the proceedings and fixed the next sitting of the Tribunal at Bombay on 14th April 1954 onwards as one of the Members was transferred to Nasik and the other member was from Bombay. On 12th April 1954 the petitioner sent a telegram to the Chairman and also a letter enclosing a medical certificate urging that it was not advisable for him to undertake the strain of a long journey to Bombay. On 14th April 1954 the petitioner remained absent and the Tribunal after considering all the aspects of the matter passed an order Ex. 98 deciding to proceed with the matter. The Tribunal has now to proceed to consider the two points framed by the High Court of Bombay on merits.

3. Before the Tribunal proceeds to do so, it will be necessary to consider the point raised by Shri Patwari with regard to the competence of this Tribunal to hear and decide these points and the contention of the petitioner that this Tribunal is bound to proceed on the assumption that Shri Dahyalal Mehta was a person serving under the State of Bombay in view of the observations in the High Court's order.

4. Shri Patwari's contention is this: He contends that the Tribunal became functus officio the moment it decided the Election Petition No. 323 of 1952 on 30th January 1953. In the Special Civil Application No. 847 of 1953 the Election Commission was not made a party but the Members of the Tribunal were impleaded. The decision of the Tribunal having been implemented by the Election Commission it was the Election Commission alone on which a writ could be issued and as the Election Commission functions at New Delhi the High Court of Bombay had no jurisdiction to issue the writ. It was also contended by Shri Patwari on the authority of *Shankar Nanasaheb Karpe V. The Returning Officer, Kolaba District*, 54 Bom. L. R. 137, that the High Court could, if at all, quash the order of the Election Tribunal but could not remand the matter for findings to the Tribunal and therefore also Shri Patwari urged that this Tribunal was not competent to give findings on these points. The Tribunal has considered these contentions of Shri Patwari. It is true that in *Election Commission, India, Appellant Vs. Saka Venkata Rao Respondent*, reported in A. I. R. 1953 Supreme Court 210, the Supreme Court held that the High Court was not competent under art. 226 to issue any prerogative writ to the appellant Commission which was functioning at New Delhi, outside its jurisdiction. It is also true that the Tribunal became functus officio on 30th January 1953 when it disposed of the Election Petition No. 323 of 1952. The Members, who previously constituted the Tribunal, no longer remained Members of the Tribunal that had become functus officio and could not be parties to the proceedings in the capacity of the Members of the Tribunal. The Election Commission, India which had implemented the decision of the Tribunal was the only body that could act after the Tribunal had become functus officio. The Nagpur High Court in *Ramkrishna Mohan, Petitioner Vs. Daoosing Sheoprasad Singh and others*, dealt with a similar position in A. I. R. 1953, 357 and refused to issue a writ observing as under:—

"There is another argument which is conclusive. The order of Election Tribunal when adopted by the Election Commission and notified, becomes an order of the Election Commission. The Election Tribunal is nothing more than an amanuensis of the Election Commission, and the order made by the Election Tribunal, when adopted by the Election Commission, becomes not only conclusive but takes its effect for all intents and purposes as the act of the Election Commission. To issue a process against a body which is now 'functus officio' to quash its order would, in the events which have happened, be a process against the Election Commission itself. That is not possible because it has now been authoritatively ruled that the Election Commission is not subject to the writ process of the High Court within the territorial jurisdiction of which the Commission is not situate. It cannot be denied that in the present matter the Election Commission is not within our territorial jurisdiction and

we cannot therefore by a writ compel the Election Commission to choose a course other than what it has. No Court does directly which it cannot do directly. It is manifest that we cannot issue our process to the Election Commission and we should not, even if the power be there (which we hold is not), issue a process which would indirectly compel the Election Commission to a course we could not have directly ordered. If the Election Commission chooses to ignore our order, there would be no means of compelling obedience. To act in this manner would be wrong, not only in principle, but also against the practice of Courts".

The Tribunal is of the opinion that the order will not be effective against the members of the original Tribunal who became functus officio as soon as the decision was published by the Election Commission. The order of the High Court will not in law be binding on the Election Commission which was not a party to the petition and which is situated at New Delhi beyond the jurisdiction of the High Court. A Tribunal can be appointed by the Election Commission only under Section 86 of the R. P. Act. It had appointed the Tribunal, the Tribunal had given its decision dismissing the petition which was published and the matter ended there. That petition was not revived by a legal order of a competent authority. The Tribunal appointed is a new Tribunal and it can only be appointed if the provisions of Section 86 of the R. P. Act are satisfied. Section 86 cannot apply to the facts of this case. The Tribunal, therefore, thinks that the present Tribunal is not legally appointed. However, as the Election Commission has appointed the Tribunal and referred the matter to it, the Tribunal deemed it desirable to consider the questions referred to it. No finding of the Tribunal having been reversed by the High Court, there is no question of there being a remand.

5. The contention of petitioner Shri Nyalchand that the question of the status of Shri Dahyalal Mehta is concluded appears to be unsound on interpreting the judgment of the High Court in the light of the record of the case. Before the Tribunal discusses this matter further the Tribunal would like to quote some portions of the High Court's order on which the petitioner has laid much stress. Paragraph 3 of the judgment states "There are certain admitted facts to which attention may be drawn. This Dahyalal Mehta performed two separate and independent roles. He was not only the full-time Secretary of the District Rural Development Board, Banaskantha, and as such a full-time Government Servant, but he was also the President of the Banaskantha District Congress Election Propaganda Board set up by the Congress party in that District for the purpose of carrying on propaganda on behalf of the Congress Candidates. The other admitted fact is that this Dahyalal Mehta in his capacity as the President of this District Congress Election Propaganda Board addressed letters to various persons in the constituency asking them to vote for the Congress candidates." In paragraph 5 of the judgment it is observed "Respondent No. 1 was an official Congress candidate. A Propaganda Board was set up to support him and other Congress candidates. Dahyalal Mehta was the President of the Board. In that capacity he issued letters to voters to vote for Congress candidates; and it was for the Tribunal to consider whether in these circumstances and on these admitted facts Dahyalal Mehta could be considered to be an agent of the Congress candidate. If he was an agent, then undoubtedly the case falls under sub-section (8) of Section 123, because as an agent he sought the assistance of a Government servant, who happens in this case to be himself." It was urged by Shri Nyalchand that the only thing which the Tribunal had to do was to find whether Shri Dahyalal Mehta was an agent of Shri Vithalbhai Patel and if the answer was in the affirmative it should give its finding that the case fell under sub-section (8) of Section 123 without any further consideration. The contention of Shri Nyalchand was that owing to the observation in the judgment it was not open to the Tribunal to consider whether Shri Dahyalal Mehta was a person serving under the State of Bombay or not. As against this Shri Patwari contended that the petitioner was the only person who appeared before the High Court, the only person who addressed the High Court and the observations of the High Court were the result of the mis-representations of the petitioner and the suppression of the true facts on the record by the petitioner. Now, it was stated by the petitioner that his allegation that Shri Dahyalal Mehta was a Government servant was denied by respondent No. 1, Shri Vithalbhai, in paragraph 9 of the written statement; The very first issue of issues Ex. 24 was "Whether Shri Dahyalal M. Mehta, Secretary of the District Rural Development Board, Banaskantha, at Palanpur, is a person serving under the State of Bombay? Whether he has assisted respondent No. 1 in the election?" Shri Nyalchand conceded that it was not an admitted fact that Shri Dahyalal Mehta was a person serving under the State of Bombay. Shri Nyalchand was told that in a matter which was proceeding ex-parte it was his duty as an Advocate to place facts

both for and against him correctly and Shri Nyalchand stated that he had pointedly stated before the High Court that that fact was disputed by respondent No. 1. Shri Nyalchand admitted that he was present when the judgment was being dictated and he was asked how it was that the fact was stated to be 'admitted' when Shri Nyalchand replied that he was not attentive at the time the judgment was being dictated; it may be that the stenographer made a mistake in hearing his Lordship. For himself he could not urge that it was an admitted position that Shri Dahyalal Mehta was a person serving under the State of Bombay and if he had heard the word "admitted" being dictated he would have got up and said that there was no such admission. He said that he only knew this when he read the judgment. He, however, urged that once these observations were made in the judgment, the matter was concluded and the Tribunal must proceed on the basis that Shri Dahyalal Mehta was a Government Servant. Shri Nyalchand submitted that his inference was that the High Court used the word "admitted" in the sense of proved. As already observed above, the High Court did not give any findings and did not consider any evidence on the question whether Shri Dahyalal Mehta was a person serving under the State of Bombay or not. This Tribunal cannot accept the inference of the petitioner that the High Court used the word 'admitted' in place of the word 'proved'. The observations of the High Court are made with a view to show that there is a *prima facie* case for the question framed being considered. What the High Court has done is that it has directed the Tribunal to consider two questions and also directed that the two points should be considered while considering the first question. This does not prevent the Tribunal from considering these two questions from all points of view and on the basis of the evidence on the record. The judgment directs that the points specifically mentioned for being considered should not be ignored. But that does not prevent the Tribunal from considering other points which should be considered before it can come to the conclusion whether Vithalbai and Shri Dahyalal Mehta committed a major corrupt practice under Section 123(8) of the R. P. Act or not. The Tribunal had not, when it delivered its judgment on 30th January 1953, thought it necessary to decide this question about Shri Dahyalal's status on account of the view it took on facts. The Tribunal did not hold it established that Shri Dahyalal Mehta had assisted respondent No. 1 in the election. The first point which is to be determined under the orders of the High Court is whether any major corrupt practice was committed by Mehta or respondent No. 1 within the meaning of Section 123(8) and the most important ingredient under Section 123(8) is that the person whose assistance should have been procured or obtained should be a person serving under the Government of India or the Government of any State. It is conceded by the petitioner that the fact is not admitted but is hotly contested by respondent No. 1 and there has been no finding on the question whether Shri Dahyalal Mehta is a person serving under the State of Bombay. Unless that finding is given, the major corrupt practice specified under Section 123 (8) cannot be held to have been proved.

6. The petitioner had, when he had argued out the Election Petition, urged that Shri Dahyalal Mehta was appointed by the order of the State of Bombay, that he was granted Rs. 150/- per month as honorarium by the Government resolution issued by the Government of the State of Bombay; that he was given travelling allowance by a Government resolution; and that he was liable to be removed from the office by the State of Bombay. On the other hand, it was urged by Shri Patwari that there was a difference between a person being a servant working under the State and a person rendering services to the State, that though the District Rural Development Board may be subject to the orders of the State, there was no such day-to-day control which a master exercised over the work of his servant and a good deal of initiative was left to the Board as well as to Shri Dahyalal Mehta who was working under the direction of the Board. Shri Patwari also urged that the very designation of Shri Dahyalal was "non-official Secretary". In order that Shri Dahyalal Mehta may be a person serving under the State of Bombay, a relationship of master and servant must be shown to exist between the State and Shri Dahyalal Mehta. It is, therefore, necessary to find out what is the essential factor in the relationship of a master and a servant. In Halsbury's Laws of England, 2nd edition, volume 22, in paragraph 191 at page 112, it is stated that whether or not, in a given case, the relation of a master or servant exists is a question of fact; but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done. It is further stated that a person may be the servant of another although a third party has the power of appointing or dismissing him or requiring his dismissal or has powers of directions and control in regard to his work or pays him his wages. In *Simmons v. Heath Laundry Company* (1910), 1 K. B. 543, where the Court of Appeal was dealing with the question as to what a contract of service was, Buckley L. J. observed that a contract of service necessarily involved the existence of a servant. The observation

of Bramwell L. J. was quoted with approval that a servant is a person subject to the command of his master as to the manner in which he shall do his work. The observations of Fletcher Moulton L. J. appear at page 550 that the greater the amount of direct control exercised over the person rendering the service, by the person contracting for them, the stronger the grounds for holding it to be a contract of service. In *Goolbai Motabhai Shroff V. Pestonji Cowasji*, 37 Bom. L. R. 410, Mr. Justice Wadia of the Bombay High Court had to decide whether a person made an accident in the course of employment as a servant and consequently His Lordship had to decide when a relationship of master and servant arises. The following observations of Mr. Justice Wadia appear at the end of page 415 of the report:—

“A servant is a person who voluntarily agrees whether for wages or not, to subject himself at all times during the period of his service to the lawful orders and directions of another in respect of the work to be done by him. It is that other person who is entitled in law to give orders and to have them obeyed. The relationship, therefore, exists only between persons of whom the one has the control of the work done by the other, and it does not depend merely on the mode of payment for service or on the time for which services are engaged, or the nature of those services or on the power of dismissal, though these are certainly matters which the Court may take into consideration in assessing the relationship. The test, therefore, is the right of control which a person has in the manner in which the other does the work.”

The alleged status of Shri Dahyalal Mehta is, therefore, to be tested on the basis of these principles. The mere facts that Shri Dahyalal Mehta may be getting an honorarium from the State or that he may be paid travelling allowances from the State or that the appointing authority is the State or that his services are liable to be dispensed with by the State are not conclusive of the question whether Shri Dahyalal Mehta is a person serving under the State of Bombay or not. They may be questions that may be considered but the real test will be the right of control which the State has in the manner in which Shri Dahyalal Mehta did the work. The petitioner must show that Shri Dahyalal Mehta is under the control of the Government of the State of Bombay not with regard to what he should do but also in the manner of doing it. In case the requisite control does not exist, the mere power of appointment or dismissal or the payment of honorarium or travelling allowances from Government treasury will not avail. The greater the scope of discretion to Shri Dahyalal Mehta the less would be the likelihood that he is a servant of the State. It must be shown that Shri Dahyalal Mehta has agreed to subject himself at all times to the orders and directions with regard to the nature and the manner of the work. Again, it will be the position of Shri Dahyalal Mehta *vis-a-vis* the Government that will have to be examined and it should not be confused with that of the Board itself. It is necessary to appreciate how the Rural Development Boards came into existence and what is the purpose and scope of the formation of these Boards. Ex. 77, the Resolution of Government No. 2127 in the Agriculture and Rural Development Department dated 4th March 1948 shows that the Rural Development Boards were constituted under Government resolution No. 911, dated 9th August 1946. In 1948 the Government were of opinion that in the changed circumstances the Board should consist of persons who were mainly concerned with the social and economic uplift of the rural areas and whose advice and suggestions for the improvement or extension of those activities would be useful in the carrying out of the various development schemes which may be undertaken by Government. Government, therefore, laid down fresh lines for the constitution of the District Rural Development Boards as stated in Ex. 77. Members of the Legislative Assembly, members of the Legislative Council, who are residents of the District and represent rural constituencies, President of the District Local Board and the representatives of the Co-operative movements were associated along with other non-official members with the District officers and the Collector of the District was to be appointed the *ex-officio* Chairman of the Board. The Vice-Chairman and the Secretary of the Board had to be a non-official but the District Agricultural Officer had to work as a joint Secretary of the Board to serve as a link between the Board and the Department of Agriculture. The position of the non-official Secretary, in which Shri Dahyalal Mehta was, stands contrasted in just a position with the official Joint Secretary. The subsequent G. R. No. 4348 Ex. 76 was issued by the Government in the Agriculture and Forests Department on 22nd November 1949. On reviewing the position after the report of the Administrative Enquiry Committee relating to the District Rural Development Boards the functions and duties of the District Rural Development Board were laid down. It is for the Board to formulate scheme for the improvement of the rural areas and for increasing the production of the agricultural committees. It had to execute schemes and administer funds as may

be made their responsibility. It has to supervise and guide the work of the Taluka Boards and Village Food Production Committee. By Government resolution No. 4457 dated 22nd December 1949 Ex. 70 in supersession of the orders issued earlier the District Rural Development Board was re-constituted. The Board consisted of 16 non-officials and 10 officials with a non-official Secretary and Shri Dahyalal Mehta was by that very resolution appointed the non-official Secretary. The Government also thanked the members of the existing Board for the work done as members of the Board. Thus there was a majority of non-official members and Shri Dahyalal Mehta was a non-official Secretary, whose position remains contrasted with the 10 persons mentioned as officials one of whom the District Agricultural Officer, Banaskantha was the *ex-officio* Joint Secretary. Ex. 76 shows that a good deal of discretion was left to the Board. Though the Collector was the Chairman, *ex-officio*, and the reports of the proceedings of the Board were to be forwarded to the Secretary of the Rural Development Board, who would submit them to Government through the Chairman, there is nothing to show that in the manner of carrying out the schemes the Board works under the control of Government. The reports of the proceedings are to be submitted to the Secretary through the Provincial Board. Though even the Development Board has no direct contact with the Government of the State and the proceedings have to go through the Provincial Board, there is nothing to show what happens after the Provincial Board forwards them to the Government. Function (c) stated in paragraph 6 of Ex. 76 would indicate that when a scheme has been approved, the scheme and the funds are under the responsibility of the Board, it is the Board who has to execute them. Thus not only Shri Dahyalal Mehta is not shown as subject to the control of the State with regard to the manner of work but even the Board is not shown to be so subjected. There appears to be a large discretion in the manner of framing scheme and executing them which is inconsistent with the position of a servant. The petitioner's contentions are based on the inferences arising from the documents. Respondent No. 1 Shri Vithalbhai, who also occupied a similar position of non-official Secretary of the Rural Development Board, Mehsana, deposed at Ex. 67 that the Secretary has to act under the instructions of the Chairman who himself has to act according to the resolution of the Board. The Board itself has got preponderance of non-officials. Shri Vithalbhai has deposed that he had not to ask from the Chairman leave for leaving the station, he continued to do his business as a chemist and druggist while acting as a Secretary of the Rural Development Board. He was appointed on terms similar to those of Shri Dahyalal and what he deposed with regard to him would equally apply to other Secretaries of the Rural Development Boards. He deposed that he was not prevented from taking any part in political activities and he was not prevented from doing his business. The Secretaries of the Rural Development Boards were not subject to transfer, they had not to seek permission or leave and the Government servants' conduct Rules did not apply to them.

7. The Jabalpur Tribunal in Election Petition No. 3 of 1952, the judgment in which is reported at page 542 of the Gazette of India, Extraordinary, Part II, Section 3 dated 26th February 1953, was dealing with the question whether a sarpanch or a panch of the Nyaya Panchayat was a servant under the State. The Tribunal observed at page 553 as under:—

"Murarilal Sarpanch had worked for respondent No. 1, and Toomchand another Panch had worked as his polling agent. Assuming other panchas such as Hulla Prasad and Sardarsingh had also worked, for respondent No. 1, the matter will not be covered by Section 123(8) of the Representation of the Peoples Act, inasmuch as a Panch or Sarpanch is not in our opinion a person serving under the State. He can in no sense of the terms be taken to be a servant of the State. A Panch is either selected from amongst the members of Gram Panchayat or is nominated by the Government. His selection or nomination will not put him into the category of servants. Sub-clause (b) of the explanation added to 123(8) of the Act mentions a number of village officers that are included in the Panch who works as an honorary Judge or Magistrate cannot be included in that category. Relationship of a master and servant is not created by the nomination or election and appointment of a panch."

8. The Act makes a distinction between a person who occupies a position of profit under the Government of a State and a person serving under the Government of the State. If Shri Dahyalal Mehta receives the honorarium of Rs. 150 per month and travelling allowances from the treasury of the State he does occupy a position of profit under the State. The position of profit would be conferred by the State and can also be taken away by the State. The circumstances pointed out by the petitioner do not take the case further than Shri Dahyalal Mehta being a

person occupying a position of profit under the State. A person occupying a position of profit was, by the Constitution of India disqualified for being a member of the State Legislature unless that disqualification was removed and the Bombay Legislature Members (Removal of Disqualifications) Act, 1951 was passed to remove that disqualification with regard to the persons mentioned in the Schedule. The office of the Secretary of the District Rural Development Board, Banaskantha, was referred to as one of the offices with respect to which the disqualification was to be removed. The petitioner has failed to show that essential test which brought into being the relationship of master and servant is satisfied in this case and Shri Dahyalal Mehta is not merely a person occupying the position of profit but he is a person serving under the State of Bombay.

9 The Tribunal, therefore, proceeds to consider the points framed by the High Court in the light of what is stated above. As already shown above, the application of Section 123(8) of the Act can only be attracted if Shri Dahyalal Mehta is a person serving under the State of Bombay. As Shri Dahyalal Mehta is not shown to be such a person the major corrupt practice under Section 123(8) cannot be established to have been resorted to either by Shri Vithalbhai or by Shri Dahyalal Mehta, even if the other ingredients mentioned in Section 123(8) are established and even if the two points which the High Court has directed to be considered in determining this question are found in favour of the petitioner.

10 There is also another reason why the alleged major corrupt practice or illegal practice cannot be said to have been made out. These points are to be determined because Section 99 requires that at the time of making an order under Section 98 the Tribunal shall also make an order as provided for in Section 99. Section 99(a) provides the condition precedent requiring the order to be recorded "where any charge is made in the petition of any corrupt or illegal practice having been committed at the election." It is, therefore, necessary to turn to the petition to find out what corrupt practice has been alleged. The major corrupt practice which has been alleged under Section 123(8) is alleged at paragraph 8, namely, "that respondent No. 1, his agents and other persons obtained or procured or abetted or attempted to obtain or procure assistance for the furtherance of the prospects of the first respondent's election from a servant of the State of Bombay, viz Shri Dahyalal M. Mehta, who is serving under the State of Bombay as a paid Secretary to the Banaskantha District Rural Development Board at Palanpur". It is quite clear that the only case of the petitioner in the petition is that respondent No. 1, his agents and other persons took the assistance of Shri Dahyalal Mehta, who is in that paragraph described as a person serving under the State of Bombay only, and not as an agent of Shri Vithalbhai. There is no case in the petition that Shri Dahyalal Mehta occupied a double capacity and that Shri Dahyalal Mehta as the agent of respondent No. 1 took the assistance of himself in his capacity as a person serving under the State of Bombay. The parties went to trial on that allegation and issue No. 1 of Ex. 24 was framed on that allegation. That was not also the case of the petitioner during his evidence. At the hearing the case of obtaining the assistance or procuring the assistance was confined to respondent No. 1 only. It was not stated that any other person besides respondent No. 1 obtained the assistance of Shri Dahyalal Mehta. The Tribunal came to the conclusion that the case pleaded in the petition with regard to the obtaining or procuring of the assistance of Shri Dahyalal Mehta was not made out and therefore did not hold the alleged major corrupt practice under Section 123(8) proved without going into the question whether Shri Dahyalal Mehta was a person serving under the State of Bombay or not. When the petitioner, who is an Advocate, realized this position and also realized the difficulty of getting this finding reversed on facts, he sought to make out an entirely new case in the Special Civil Application No. 847 of 1953 which he had not made during the hearing of the Election Petition. When such a case was not made out before the Tribunal, the Tribunal naturally could not consider a contention which was not urged before it. Similarly, there is no allegation in the petition that Shri Dahyalal Mehta is a person other than the candidate or his agent incurred or authorised expenses for any purpose whatsoever for the purpose of promoting or procuring the election of the candidate. It was urged by the petitioner that he only came to know about the amount of Rs. 2-12-0 spent from the D. L. B. funds being refunded after the filing of the petition. That may be so, but there will not be any justification for ignoring a mandatory provision of Section 99(a). The petitioner urged that he came to know about it during the hearing of the Election Petition but no attempt was made to bring that to the notice of the Tribunal and no effort was made to seek permission to amend the petition by an amendment of the petition.

11 It should also be pointed out that throughout the Election petition the petitioner has not described Shri Dahyalal Mehta specifically as an agent of respondent No. 1 though he has described Shri Dahyalal Mehta as a Congress worker, an office bearer in the Congress Committee and a friend and well-wisher and



colleague of Shri V. R. Patel. In the opinion of the Tribunal as the condition mentioned in Section 99(a) is not specified it would not be necessary to record the findings directed in Section 99(a) and (i) and (ii) and still as the High Court has directed that these points should be considered they are considered below.

12. As stated above, Shri Dahyalal Mehta has not been alleged to be the agent of Shri V. R. Patel. However, the fact remains that Shri V. R. Patel was the official Congress candidate who was granted a Congress ticket. Shri Dahyalal Mehta is a leading Congress worker of the district and he was appointed by the Gujarat Prantik Congress Prachar Committee, which gave the ticket to Shri Vithalbhai, as the convenor of the Banaskantha Chutni Prachar Samiti. This fact was known to Shri Vithalbhai as it appears from his deposition. Thus the Congress or the G. P. C. C. would be in law the agent and Shri Dahyalal the sub-agent of Shri Vithalbhai Patel. Under the Act the effect of the act of the sub-agent would be the same as that of an agent.

13. The second point which is directed to be considered specifically is whether respondent No. 1 by his conduct or acts ratified the signing of the letters by Shri Dahyalal Mehta to the voters asking them to vote for Congress candidates. In this connection the aspect which was relied upon by the petitioner and on the basis of which their Lordships gave this direction was that Shri Dahyalal Mehta had written letters to the voters of the Local Authorities' Constituency and the mention about sending of these letters was made in Exs. 49 and 50 and as Shri Vithalbhai was one of the person to whom these letters were sent, Shri Vithalbhai knew that Shri Dahyalal Mehta was writing these letters in furtherance of his election prospects and this constituted ratification on the part of Shri Vithalbhai. The documents which would be necessary to be considered would be Exs. 26, 28, 49 and 50. Exs. 26 and 28 are letters which Shri Lallubhai Chhunchha, a member of the District Local Committee of Management and a member of the Deesa Municipality, said he had received from the D. L. B. office. The receipt of these two letters is proved by the evidence of Shri Lallubhai Chhunchha. What is sought to be argued is that Exs. 49 and 50 would go to show that 15 covers in all in connection with the voting in the Local Authorities' Constituency were addressed to all members of the Board as shown by item No. 257 of Ex. 49. There are five additional covers which are stated to have been sent in connection with the subject-matter of item No. 257 and one of the names is of Shri Vithalbhai Patel. It is urged that Shri Vithalbhai Ranchhoddas Mehsana is the same person as Shri V. R. Patel, that he must have received this letter and he was, therefore, aware that Shri Dahyalal Mehta was writing such letter. Shri Dahyalal Mehta was summoned by the petitioner as his witness but he rested content with getting some documents produced and did not choose to examine Shri Dahyalal Mehta as a witness. The petitioner also did not examine any other person from the D. L. B. Office. The document from the D. L. B. Office is not the document of respondent No. 1. There is nobody who has come and deposed that these covers were actually posted, except the name and the place; the exact address of the addressee is not stated. A presumption would arise if an envelope which has been properly addressed to the addressee and bearing the proper postal stamp is proved to have been posted. In A.I.R. 1923 Rang. 76, it was held that it was not a correct proposition that posting proved delivery. There is no such evidence of the posting of the letter to Shri Vithalbhai. Even when Shri Vithalbhai stepped into the witness box the petitioner did not put a single question in cross-examination whether such a letter was received by him. When the Tribunal asked for the petitioner's explanation he said that he was not bound to put such a question. The petitioner has no personal knowledge. Shri Vithalbhai has been examined at Ex. 67 and he has deposed on oath "When the petitioner produced letters Exhs. 26 and 28 before the Returning Officer I knew for the first time that Shri Dahyabhai had written these letters recommending my candidature. . . . I had not requested Shri Dahyabhai to give me his vote nor had I requested him to recommend for me to other voters. . . . After 9th April 1952 I did tell Dahyabhai that he ought not to have written such letters." This would go to show not only that Shri Vithalbhai had not ratified the conduct of Shri Dahyabhai Mehta but in fact he had protested against it after he came to know about it.

14. As already observed above, the illegal practice alleged to have been committed by Shri Dahyalal Mehta within the meaning of sub-section (1) of Section 125 in that Shri Dahyalal Mehta spent for the postage of the letters sent by him to various voters asking them to vote for the Congress candidates has not been alleged. As far as the petition is concerned, the petitioner was then trying to make out a case of undue influence. The whole paragraph 9 of the petition which deals with Shri Dahyalal Mehta writing letters in his official capacity to the electors to vote for Shri V. R. Patel is aimed at a case of undue influence and not a case of an illegal practice under Section 125(1) of the Act. Section 125(1) of the Act has not been referred to in the paragraph at all. The major corrupt practice under Section 123 of the Act which deals with undue influence has been specifically stated. The Tribunal had held the case of undue influence not proved. The petitioner, therefore, for the first time in the Special Civil Application No. 847 of

1953, when he saw that he could not successfully utilize the circumstance about the sending of Exs. 26 and 28, tried to make out a new case of an illegal practice under Section 125(1).

15. The Tribunal, however, proceeds to consider that point as it has been directed to do so. Section 125(1) would apply only if Shri Dahyalal Mehta is a person other than a candidate or his agent. He must be shown to have incurred or authorized expenses for the purpose of promoting or procuring the election of the candidate. Apart from other letters Exs. 26 and 28 are proved to have been sent to Shri Lallubhai Chhunchha. It must be shown that the expenses of posting these letters were made by Shri Dahyalal Mehta personally. There is no such allegation in the petition. Again, the evidence at the trial is that the expense incurred in posting these letters was refunded to the District Local Committee of Management. A question would still remain whether the amount was refunded by Shri Dahyalal personally from his own pocket or from the funds of the Banaskantha Prachar Samiti of which he was the convenor. There is no direct evidence in this connection. Looking to the case of the petitioner himself, Shri Dahyalal Mehta was a leading Congress worker and a person in charge of conducting the Congress election propaganda. The Tribunal has found that Shri Dahyalal Mehta would be a sub-agent of Shri Vithalbhai in case a proper allegation had been made and consistently with the case of the petitioner the position would be that the amount would be refunded by Shri Dahyalal Mehta in the capacity of the agent of the Congress and on behalf of the Congress or Chutni Prachar Samiti. In this view of the matter it would be the institution which had put up Shri Vithalbhai as its candidate that was bearing the expenses. This would be covered by explanation to Section 125(1) which states that any such expenses as aforesaid incurred or authorised by any institution or organization for the furtherance of the prospects of the election of a candidate supported by such institution or organization shall not be deemed to be expenses incurred or authorized within the meaning of this clause.

16. As a result of the above, findings, both the points which the High Court directed the Tribunal to consider should be found in the negative. So far as costs are concerned the Tribunal had already passed an order with regard to the costs of Election Petition No. 323 of 1952. That order has not been disturbed by the High Court and the High Court has specifically stated that the point urged was not by way of disputing the finding of the Tribunal. What the Tribunal would now have to consider would be the costs with regard to this inquiry. The hearing of this inquiry was fixed at Ahmedabad on 1st March 1954, 2nd March 1954, 11th March 1954, 12th March 1954 and 13th March 1954. Thereafter the sitting was at Bombay on 14th April 1954 onwards and Shri Patwari for respondent No. 1 made his submissions on 14th April 1954. Taking this into consideration the Tribunal is of opinion that the petitioner should pay Rs. 100 by way of costs to respondent No. 1. No order with regard to costs is made in respect of other parties.

#### ORDER

No corrupt or illegal practice has been proved to have been committed by Respondent No. 1 Shri Vithalbhai or his agent or with the connivance of Respondent No. 1 or his agent at the election. The petitioner do pay Rs. 100 as costs of and incidental to this inquiry in connection with the petition to Respondent No. 1 Vithalbhai. The other parties to the petition to bear their own costs.

BOMBAY,

(Sd/) B. C. VARIL, *Chairman*.

The 19th April 1954.

(Sd/) T. P. GHOGALE.

(Sd/) A. A. ADARKAR.

#### ANNEXURE

Exh. No. 98.

ELECTION PETITION NO. 323 OF 1952.

Shri Nyalchand V. Sheth.—*Petitioner*.  
Vs.

Shri Vithalbhai Ranchhodlal Patel.—*Respdt. No. 1, and others*.

## ORDER

The Tribunal heard the petitioner Shri Nyalchand Sheth on 11th March 1954 and 12th March 1954 on the issues which the High Court in Special Civil Misc. Application No. 847 of 1953 directed it should specially consider. It was the contention of Shri Patwari that certain matters which were stated to be admitted were in fact disputed and the statement so appeared in the High Court order owing to the presentation of facts by the petitioner who alone appeared before the High Court. The Tribunal decided to hear the parties fully to prevent a fresh contention being raised later that the Tribunal had failed to exercise its jurisdiction and decided to determine the questions sent for its consideration according to law, with the full contentions of both the sides before it. The petitioner made his full submission on 11th March 1954 and finished it on 12th March 1954. He was then given an opportunity to make his submission on the question whether Shri Dahyalal Mchta was a person serving under the State of Bombay subject to his contention that that point did not remain to be considered by the Tribunal but he refused to do so and gave an application for time to move for the transfer of this case from the Tribunal. The Tribunal granted time till 14th April 1954 and directed that the case would be heard at Bombay on 14th April 1954 as one of the members Shri Ghogale was transferred to Nasik, unless the petitioner obtained an order of stay of proceedings.

The petitioner did nothing till the period had almost expired and on 12th April 1954 sent a telegram to the Chairman stating that he was suffering from the effects of vestibular damage and his health did not permit him a long journey and the next date may be fixed at Ahmedabad. Along with his letter dated 12th April 1954, he sent a medical certificate of an Aurvedic practitioner of Vijapur which reached the Chairman on 13th April 1954. As the order to be passed was of a judicial nature the question was considered by the Tribunal on 14th April 1954 at its sitting at Bombay.

After carefully considering the matter in all its aspects, the Tribunal decides to proceed with the matter. In the first place it is doubtful whether the Tribunal is bound to take notice of communications received through post or by telegrams. The alleged illness is not a new one. Shri Patwari pressed the Tribunal to proceed with the matter submitting that the petitioner had got the delay in filing Special Civil Miscellaneous Application condoned on the ground of this illness and thereafter at the time of arguing the Special Civil Application he had come down to Bombay to argue it in person, when the effects, if at all existing would be greater than they would be on 13th April 1954. After that he had been practising in Courts of the Mehsana District and came to Ahmedabad and argued this petition with great vehemence and vigour. It was Shri Patwari who had to make his submission on 14th April 1954. Though Shri Nyalchand Sheth had obtained a full one month's time to move for transfer and obtain stay, he did nothing till the period almost expired and just on the eve of the inquiry sent a telegram and letter to the Chairman. There was nothing that came suddenly. The alleged effect is not alleged to have been non-existent on 13th March 1954 and to have revived later. Shri Nyalchand could have engaged a pleader and instructed him to appear before the Tribunal as he knew about the Bombay sitting one month back. The order of fixing the venue at Bombay was passed on 13th March 1954. He made no protest then. If the objection with regard to the venue was *bonafide*, Shri Sheth would not have sat silent till 12th April 1954. The Tribunal is convinced that the move of Shri Nyalchand is not *bonafide* and is aimed at protracting the proceedings. The telegram and the certificate do not make out that his health became worse after 13th March 1954 and that it was not possible for Shri Sheth to go to Bombay and hear Shri Patwari and give his reply if any. He had finished his submission, he had refused to say anything on the question of the disputed status of Shri Dahyalal, even subject to his contentions, and now proceeding with the matter in his absence would not cause him any prejudice. As a matter of fact Shri Sheth had fully argued the disputed question of status on the earlier occasion and the finding was not given by the Tribunal (*vide* order dated 30th January 1953) as it appeared to be unnecessary on the view it took on the questions of facts. The Ayurvedic practitioner considers the strain of a long journey inadvisable and not one which Shri Sheth cannot undertake. The certificate is vague. It does not state when the Doctor examined Shri Sheth or how long he had been under his treatment.

This is an old election petition of 1952. The petitioner does not appear to be serious to proceed with it. The petitioner knew that he would have had to proceed with the petition as he had done nothing within the ample time given to him

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and he therefore resorted to this move to stop the proceedings. The Tribunal therefore decides to proceed with the matter.

BOMBAY,

(Sd/) B. C. VAKIL, *Chairman.*

(Sd/) T. P. GHOGALE.

The 14th April 1954.

(Sd/) A. A. ADARKAR,

*Members of the Election Tribunal.*

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[No. 19/323/52-Elec. III/8980.]

By Order,

D. J. SENGUPTA, Asstt. Secy.